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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

DONALD I. TILTON, WILFRED L. BECK, JR.,
GUY H. McCLEARN, JR.,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

BRIEF

Of Respondent in Opposition to
Petition for Certiorari.

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No. 664.

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QUESTION PRESENTED.

In their petition for certiorari, the petitioners have presented a question which does not accurately reflect the issues decided by the lower Courts. The issue decided in the Court of Appeals and now presented to the Supreme Court is this:

Where the Collective Bargaining Agreement and actual practice thereunder require a period of on-the-job training which is intended to insure a minimum degree of proficiency and therefore is to be actually worked in order to qualify for promotion to a different position, does a veteran who completes such period of training and qualifies for promotion after his return from military service have the right to a seniority date in his new position as of the time he actually qualifies, or retroactively as of a time when he probably, but not automatically, would have qualified if he had not been in military service?

STATEMENT.

At the time plaintiffs left the defendant's employ to perform military service, each was classed as a carman helper and held seniority only as a carman helper, but each had been temporarily set up to the position of carman pursuant to certain agreements which permitted such temporary utilization of carman helpers as carmen because of the shortage of qualified carmen growing out of World War II. In their temporary position of carmen, they acquired no seniority rights as carmen (R. 98).

The position of carman was one of much greater responsibility and required considerably more skill and experience than the position of carman helper. Separate seniority lists were maintained and carman helpers had no right to bid on vacancies in the carman's classification. The Basic Collective Bargaining Agreement did not permit the use of carman helpers to do carman's work (R. 101).

On December 7, 1953, a new supplemental agreement was entered into, providing that if an upgraded carman helper accumulated a total of 1040 days of actual working experience in a carman's position, he was then considered as sufficiently skilled to qualify as a carman, and he was then required to elect whether he wished to relinquish his seniority as a carman helper and take seniority as a carman as of the date he so qualified, or retain his helper's seniority and go back to working as a helper (R. 99).

The plaintiffs had not accumulated the required 1040 days of actual experience in carmen's positions before they left for military service. Upon their return from military service, they were reinstated without loss of seniority and eventually were able to complete the 1040 days' work requirement. They thereupon elected to relinquish their helper's seniority and to take carman's senior-

ity. The defendant accorded each plaintiff a seniority date as carman as of the date each one qualified for and elected such position (R. 100).

The veterans alleged in their complaints and attempted to prove that if they had continued to work in the upgraded position of carmen for the period of their military service, they **would have** completed the 1040 days' work experience required by the 1953 agreement, and **would have** elected to take a carman's seniority before any other carman helper on the same seniority roster who had been upgraded after the plaintiffs were upgraded. In other words, plaintiffs attempted to show that by reason solely of their seniority and the passage of time, they would necessarily have been promoted ahead of any junior upgraded carman helpers. The District Court, however, found the facts against the plaintiffs. Contrary to plaintiffs' allegations, the Court found as follows:

> "Whether or not the plaintiffs or any of them, if they had not been in military service, would have worked as a temporary carman on every date that such work was available during that period, and whether they would have completed the 1040-day work requirement before the next upgraded helper or by any given date is not certain, even though in retrospect it may be regarded as highly probable. Nor is it certain that upon completion of the work requirement at an earlier date each of the plaintiffs would have elected to relinquish their helper's seniority.
>
> "The plaintiffs and other carman helpers who were temporarily advanced to carman's positions under the 1953 or prior agreements had no guarantee, either by reason of the contracts or actual practices under the contracts, that they could ever complete the 1040-day work requirement in order to qualify as a carman or acquire a carman's seniority. The completion of the

work requirement and the date of completion depended on a number of variable factors not within the plaintiffs' control, among which were (1) lay-offs due to illness or reductions in force, (2) the continuing unavailability of enough qualified carmen to fill carman's positions, and (3) continued satisfactory work by the carman helper in the upgraded position" (R. 101).

The plaintiffs did not challenge the findings of the District Court in the Court of Appeals (see Pet. for Cert. page 2a) and do not challenge such findings here. The Courts below concluded on the basis of those findings, and on the authority of this Court's opinion in the **McKinney** case, that where claimants' promotion to a higher position would not have been automatic or certain had he continued to work during the period of his military service, and where such promotion ahead of junior upgraded men was not a matter of right, a retroactive seniority date in the higher position is not required by Section 9 of the Universal Military Training and Service Act.

ARGUMENT.

On the basis of the District Court's findings of fact, respondent respectfully submits that the decisions of the Courts below are clearly in accord with the decisions of the Supreme Court in the **Diehl** and the **McKinney** cases.

The Diehl Case Distinguished.

In the **Diehl** case, as indicated by the Court of Appeals' opinion (211 F. 2d 95), it was regarded as an established fact that Diehl **would have** completed 1160 days of service in a carman's position on June 1, 1946, ahead of four other carman helpers, if he had not been in military service. There was no question of fact for the Court to decide. The Supreme Court's per curiam reversal of the judgment against Diehl supplied no reason for its decision other than the following:

> "**Upon the facts disclosed** in the opinion of the Court of Appeals for the Third Circuit, the applicable Acts of Congress and the opinion of this Court in **Oakley v. L&N**, 338 U. S. 278, the judgment of the Court of Appeals is reversed." 348 U. S. 960, March 14, 1955. (Emphasis added.)

The reference to the **Oakley** case is the only guide furnished by the Court as to the reasons for reversing the Court of Appeals' decision.

The opinion of the Court in the **Oakley** case, and the companion case of **Haynes v. CNO&TP**, reveals that each of the complainants had alleged that if they had not been absent in military service, they **would have** acquired a certain seniority date earlier than the seniority date they were given upon their re-employment. The District Court and the Court of Appeals held that the complaints failed to state a cause of action. Therefore, from the factual standpoint, those cases were considered by the Supreme Court only upon the facts alleged in the complaints. (See Footnotes 2 and 3, 338 U. S., l. c. 280-281, 94 L. Ed., l. c. 90.)

The only issue decided by the Supreme Court in the **Oakley** and **Haynes** cases was whether or not the complaints were barred by the expiration of one year after return from military service. The Court held:

> "We hold that the expiration of the year did not terminate the veteran's right to the seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment."

The Court went on to define the veterans' seniority rights as follows:

> "He therefore assumes, upon his re-employment, the seniority he **would have had** if he had remained in his civilian employment." (Emphasis added.) 338 U. S., l. c. 284, 94 L. Ed., l. c. 92.

It is thus apparent that the seniority which the veterans **would have had** if they had remained continuously in their civilian employment was not a factual issue either in the **Oakley-Haynes** cases or in the **Diehl** case. The decisions in those cases were therefore predicated on the undisputed fact that plaintiffs would necessarily have been promoted to the higher position on a certain date if they had not been absent in military service.

The factual situation in the present cases is quite the contrary. In these cases, the defendant proved to the satisfaction of the District Court that the plaintiffs would not necessarily have been promoted ahead of any junior carman helpers, and that there was no way for the Court to determine what their seniority relative to other promoted carmen would have been had they remained continuously in their employment during their period of military service. The Court therefore concluded as follows:

> "In cases where returning veterans claim a right to an earlier seniority date in a different position on the ground that had they been continuously employed

they would have been entitled to such earlier seniority date, the burden is upon them to show that under the terms and conditions of the agreements and practices thereunder, they would have acquired such earlier seniority date automatically upon the mere lapse of time or solely by reason of their seniority in the position held when they left for military service" (R. 102).

"Even though it appears, in retrospect, that plaintiffs probably could have qualified and would have elected to take a carman's seniority at an earlier date if they had been continuously employed, **there is no certainty that they could have or would have done so at any given time, or that they would have acquired such seniority before any helper upgraded after they were.** A showing of high probability of promotion to a better position does not meet the plaintiffs' burden of proving that such promotion was a matter of automatic progression" (R. 103). (Emphasis supplied.)

Since the Court was unable to find from the evidence presented by the plaintiffs that they would necessarily have qualified for promotion and would have elected such promotion ahead of any junior upgraded carman helper, the Court could not hold that the plaintiffs had an automatic right to an earlier seniority date than any such carman helper. This uncertainty as to when plaintiffs would have been promoted had they remained continuously employed distinguishes the case from the factual situation in the **Diehl** and in the **Oakley-Haynes** cases.

There is one other factual distinction between this case and the **Diehl** case which should be pointed out. In the **Diehl** case, the agreement concerning the seniority status of the upgraded carman helpers was not made until he and the others had already qualified as carmen. The retroactive application of the agreement resulted in a discrimination against Diehl solely because he had been absent in

military service, because it was agreed that had he remained continuously employed he would have acquired carman's seniority ahead of the other carman helpers who had been junior to him.

In the present case, however, the agreement which gives rise to plaintiffs' claim, and from which their rights to acquire carman's seniority is derived, was made in 1953, long before any of the plaintiffs became qualified or acquired any right under the agreement to elect a carman's seniority. There is no discrimination against veterans as such in the application of this agreement. It created rights for veterans and non-veterans alike which had not existed before the agreement, rights to be promoted to a higher classification upon meeting the qualifications for such promotion. Delay in meeting the qualifications, whatever the reason, works the same way on non-veterans as on veterans.

The effect of a decision in favor of the plaintiffs in this case would not be confined to these plaintiffs and to the men whom they would run around on the seniority list. Such a decision would affect the seniority of hundreds, perhaps thousands, of carmen in similar situations on the nation's railroads. It could also affect the seniority of persons in many other industries, whose promotion to higher positions also depended on the completion of training courses either on or off-the-job. It would thus greatly disturb the existing seniority rights of persons who are not parties to these proceedings and whose rights would be adversely affected without any chance to be heard.

The McKinney Case.

Based upon the findings of the District Court, the holdings of the District Court and of the Court of Appeals were clearly in accord with the decision and the principles which were established by the **McKinney** case. Justice Frankfurter, speaking for the Court, stated in his opinion:

"However, Sec. 9 (c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. **Much there is that might have flowed from experience**, effort, or chance **to which he cannot lay claim under the statute.** Section 9 (c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and **advancements in status that would necessarily have occurred** simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained **as of right, within the system of his employment**, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

"Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than he formerly held when promotion to such a position depends, **not simply on seniority or some other form of automatic progression**, but on the exercise of discretion on the part of the employer." 357 U. S. 265, l. c. 271, 2 L. Ed. 2d 1310. (Emphasis supplied.)

While the uncertainty or the lack of an automatic right to promotion in the **McKinney** case grew out of the employer's right to determine the fitness of the employee for the promotion, the principles of that case are clearly applicable in the instant case where the uncertainty grows out of other factors. The order in which upgraded men were placed on the carman's seniority roster was not determined by their seniority as helpers nor by the order in which they had been upgraded. Rather, placement on the carman's seniority roster was determined solely by the

order in which the upgraded men completed the required 1040 days of work experience and elected to take a carman's seniority. The elapsed time between their date of upgrading and their ultimate qualification for seniority as a carman varied with the individual depending on several variable factors. There was no right under the system established by the Collective Bargaining Agreements to be automatically promoted ahead of a junior helper or a junior upgraded man.

Since the District Court was not able to find from the evidence that the plaintiffs would have completed their training period and would have been entitled as of right to promotion by any given date or ahead of any junior upgraded man, the principles established by the **McKinney** case required a conclusion that plaintiffs are not entitled to a retroactive promotion.

Court of Appeals Cases.

The decision by the Court of Appeals was in accord with several decisions rendered by the first, fourth, fifth, sixth, seventh and eighth circuits, both before and after the **McKinney** decision.

Jefferson v. ACL, 303 F. 2d 522 (C. A. 5, 1962);
Poor v. L&N, 235 F. 2d 687 (C. A. 5, 1956);
Sularz v. MStP&SS, 259 F. 2d 122 (C. A. 8, 1958);
Bostian v. Seaboard Air Line, 211 F. 2d 867 (C. A. 4, 1954);
Gregory v. L&N, 92 F. Supp. 770, Affd. Per Cur. 191 F. 2d 856 (C. A. 6, 1951), Cert. Den. 343 U. S. 903;
Raulins v. Memphis Union Station, 168 F. 2d 466 (C. A. 6, 1948);
B&M v. David, 167 F. 2d 722 (C. A. 1, 1948);
Hewitt v. System Federation, 161 F. 2d 545 (C. A. 7, 1947).

The Court of Appeals cases cited by the petitioners in support of their position were decided long before the **McKinney** decision and, insofar as they are in conflict therewith, they have been overruled.

CONCLUSION.

These cases presented only a factual issue as to whether or not plaintiffs **would have** necessarily been promoted to carmen before any junior upgraded man, if they had been continuously employed. The District Court found in the negative and its findings have not been challenged. On the basis of its findings, the application of the principles announced in the **McKinney** case compels a conclusion that plaintiffs were not entitled to the relief they sought. The decision of the Court of Appeals was clearly correct as a matter of law, and the petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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Affidavit of Service.

State of Missouri, }
City of St. Louis, } ss.

I, R. W. Yost, of counsel on the foregoing brief, having been first duly sworn on my oath, state that copies of the foregoing brief in opposition to petition for certiorari have

been served upon Archibald Cox, Solicitor General of the United States, Attorney of Record for Petitioners, by depositing same in a United States mail box, first-class airmail, postage prepaid, addressed to him at the Department of Justice, Washington 25, D. C., on this 9th day of January; 1963.

(SIGNED) R. W. YOST

R. W. Yost,
Of Counsel for Respondent Missouri Pacific Railroad Company.

Subscribed and Sworn to before me this 9th day of January, 1963.

(Signed) R. C. MASON

Notary Public.

My Commission Expires Sept. 28, 1964